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IN THE
Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Petitioners,
v.
T.A. WYNER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTRODUCTION

Amicus curiae, the Brennan Center for Justice at New York University School of Law (the "Brennan Center" or "Amicus") respectfully submits this brief in support of the Respondents, and urges this Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The parties have consented to the filing of this brief, and their written consent is lodged herewith.[1]

INTEREST OF THE BRENNAN CENTER

Named for late Associate Justice William J. Brennan, Jr., the Brennan Center is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Dedicated in 1995 on Justice Brennan's 89th birthday, the Brennan Center was founded by scores of the Justice's former law clerks and the Brennan family and close friends as a living monument to the legacy of Justice Brennan. The Brennan Center frequently represents the indigent in litigation before federal and state courts. One of the stated missions of the Brennan Center is to help "ensure that low-income people have access to effective, enduring, and unrestricted legal assistance in civil cases."

The Brennan Center also helps protect the right of American citizens to vote and to have their votes counted under fair standards in free and open elections. The Brennan Center engages in research, legislative drafting and counseling, and public education on a wide range of issues related to voting rights and elections. It also litigates voting rights matters in the federal courts, where preliminary injunction proceedings can play the decisive role in enabling citizens to cast ballots and to have their votes counted.

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[1] Counsel for the parties did not author, in whole or in part, any portion of this brief. No person or entity, other than Amicus and its counsel, made any monetary contribution to the preparation or submission of the brief.

Because of the limited public and foundation funding available, the extent to which the Brennan Center will be able to represent clients in need will be affected by a limitation on the availability of attorneys' fees. As explained below, given the crucial role that preliminary injunction proceedings play in voting rights litigation, the ability of the Brennan Center to continue to litigate such cases may be adversely affected by any limitation on the availability of attorneys' fees for successful prosecution of a preliminary injunction. Such a limitation would also create perverse incentives for plaintiffs unnecessarily to expend resources in continuing litigation—even after obtaining appropriate relief—only to preserve their ability to recover statutory attorneys' fees. The Brennan Center has a strong interest in this case.

SUMMARY OF ARGUMENT

Fee-shifting statutes, like the one at issue in this case, were enacted by Congress to guarantee that important and fundamental rights could be vindicated in the federal courts. By allowing reasonable attorneys' fees to a prevailing plaintiff, fee-shifting statutes ensure that those without means will have meaningful access to justice in order to protect their rights in court.

Cases seeking to vindicate the right to vote and to political speech and participation lie at the very heart of the intended reach of the fee-shifting statutes. But Petitioners and the United States propose a rule that would undermine the effectiveness of Congress's scheme with respect to cases arising in the election context. They ask the Court to adopt a rigid rule that a party who successfully obtains a preliminary injunction cannot, without going on to obtain a final "judgment on the merits," qualify as a prevailing party for the purpose of a fee-shifting statute. In voting cases, however, a preliminary injunction is often not a prelude to some final relief, but instead represents all or a substantial part of the relief sought by a litigant. Indeed, often a preliminary injunction is the only relief that can be secured before the election itself

renders the case moot. In short, and as set out below in more detail, voting rights cases are a perfect example of why the rule proposed by Petitioners and the United States gives an unduly narrow meaning to the term "prevailing party," is inconsistent with this Court's cases construing the term, and is fundamentally unjust. The Court should reject that proposed rule and affirm the judgment below.

ARGUMENT

I. THE RULE PROPOSED BY PETITIONERS AND THE UNITED STATES SERIOUSLY THREATENS CONGRESS'S PURPOSE TO ENSURE ACCESS TO JUSTICE INCLUDING IN CASES SEEKING TO VINDICATE THE FUNDAMENTAL RIGHT TO VOTE

In this case, Petitioners and the United States as amicus curiae have proposed a rigid and unjust rule, inconsistent with the language and purpose of the statute at issue and with this Court's cases, which would significantly undermine the congressionally mandated recovery of attorneys' fees in civil rights cases. It would thus lessen the ability of persons whose rights have been violated to have access to the courts. The Brennan Center has a significant interest in this case, including as it relates to the judicial enforcement of the right to vote and the related rights of political speech and participation. Cases arising in the election context are a perfect example of why the rule proposed by Petitioners and the United States gives an unduly narrow meaning to the term "prevailing party," is inconsistent with this Court's cases construing the term, and is fundamentally unjust.

Given the timeline in which such cases are litigated—a timeline that is typically out of a plaintiff's hands—it is often impossible to obtain a full "judgment on the merits" that would resolve a controversy over how an election is to proceed. Relatedly, a final "judgment on the merits" may prove impossible to achieve due to events beyond a plaintiff's control. Instead, preliminary injunctive relief is often *the* critical

tool used by litigants to vindicate their own and others' right to vote in free and fair elections. Indeed, because of the firm deadlines necessarily involved in such cases (most obviously, the election itself, but also voter registration deadlines, printing of the ballots, certification of the election, etc.), preliminary injunctions are often the only way to ensure that this most fundamental of our rights is vindicated. To effectuate Congress's intent in enacting the fee-shifting statutes, therefore, this Court should affirm that plaintiffs prevailing on a preliminary injunction are entitled to their attorneys' fees as "prevailing parties," at least in the absence of a subsequent ruling that the preliminary injunction was wrongfully granted.

A. The Purpose of the Fee-Shifting Statutes Is to Guarantee that Important Rights, Including the Fundamental Right to Vote, Are Vindicated

Congress enacted fee-shifting statutes like the one at issue in this case in part to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H. R. REP. NO. 94-1558, p. 1 (1976)). To promote the "vigorous enforcement of modern civil rights legislation," Congress directed that civil rights litigants should not by their lack of resources "be deterred from bringing good faith actions to vindicate the fundamental rights" behind the civil rights statutes. H. R. REP. NO. 94-1558, at 6; S. REP. NO. 94-1011, at 4-5; *see generally Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402-03 (1968) (holding that "one who succeeds in obtaining an injunction under [the Civil Rights Act of 1964] should ordinarily recover an attorney's fee").

Congress recognized that such "private attorneys general" often "cannot afford legal counsel." H. R. REP. NO. 94-1558, p. 1 (1976). The fee-shifting statutes "cloak[the civil rights plaintiff] in a mantle of the public interest," H. R. REP. NO. 94-1558, at 6, and guarantee that publicly held rights are vindicated even where public servants are unable or unwilling to

protect them. Moreover, as federal courts have recognized, fee awards in civil rights litigation also "promote[ ] the[ ] continued existence" of public interest firms, and "help[ ] assure the continuing availability of the services to those most in need of assistance." *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976); *see also Copeland v. Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) ("Full fee awards to public interest law firms help finance their work. . . .").

Congress particularly sought to ensure that litigants who secure their fundamental right to vote by private litigation are able to seek their attorneys' fees, both to encourage the judicial vindication of such rights and to ensure that those without the means to otherwise litigate such rights are able to do so. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Congress has enacted numerous statutes protecting the rights of citizens to vote, including the rights of citizens to vote in elections free from invidious discrimination; at the same time, it has mandated that "prevailing parties" in judicial "actions or proceedings" regarding civil rights generally and voting rights in particular are entitled to seek their attorney's fees. *See* 42 U.S.C. §§ 1973(e) and 1988.

In doing so, Congress recognized the important role of the courts in enforcing constitutional provisions and statutes that guarantee equal voting rights and in ensuring that entrenched interests will not lock up the political system against the popular will.[2]

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[2] For example, in this Court's memorial proceedings for Amicus's namesake, Justice Brennan, the late Chief Justice Rehnquist noted the unique role of courts in election-related cases when discussing Justice Brennan's foundational decision in *Baker v. Carr*, 369 U.S. 186 (1961). Specifically, the late Chief Justice noted that before *Baker v. Carr*, "[m]alapportionment of State legislatures [ ] had been considered political questions . . . and while the Federal courts thus declined to address the

The general policies animating fee-shifting statutes are particularly apt, and indeed often magnified, in voting rights cases. Voting rights plaintiffs frequently will not have sufficient means or monetary incentive to pursue litigation seeking to vindicate their right to vote by retaining paid counsel. The lack of a market in votes or of serious financial injury from denial of the franchise means that significant monetary damages are generally unavailable to a voting rights plaintiff. Accordingly, unlike in many other types of litigation in which there exists an independent economic reason to bring suit, such as the availability of quantifiable monetary damages or the need to protect existing business interests, voting rights plaintiffs, like other civil rights plaintiffs, often lack the ability to negotiate terms of retention of counsel in the absence of a fee-shifting statute. The fee-shifting statutes thus play a critical role in promoting access to justice for citizens seeking to vindicate their right to vote.

Compounding the difficulties in obtaining access to justice in voting rights cases in the absence of fee-shifting statutes is the fact that voting rights litigation, even at the preliminary injunction stage, is complex, time-consuming, and resource-draining. Accordingly, despite efforts to encourage private lawyers to represent indigent clients, public interest groups, such as Amicus the Brennan Center, still handle a great bulk of this type of litigation.[3] A rule like that proposed

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problem, State legislatures were also unwilling to act, because those who benefited from the existing electoral system were the ones who were making the law." Chief Justice Rehnquist noted that *Baker* "took the first step in the direction of the now well-accepted practice of one person, one vote and in so doing changed the nature of American politics forever." *Proceedings in the Supreme Court of the United States in Memory of Justice Brennan*, 523 U.S. v, xlvii (1998) (Remarks of the Chief Justice).

[3] While the national major political parties often have both the incentive and resources to litigate election-law disputes, their own partisan interests may not coincide with the public interest, and voters may not find their interests aligned with either major political party, or indeed any political party. The Brennan Center has in the past represented minor parties trying

by Petitioners and the United States, which as explained below would greatly affect voting rights litigation, would therefore seriously undercut the ability of citizens to vindicate this important right in federal court.

B. In Voting Rights Cases, Preliminary Injunctions Often Are Both Necessary and Sufficient to the Vindication of Important Rights

Denial of the right to vote in a free and fair election constitutes an immediate, irreparable harm. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *Montano v. Suffolk County Legislature*, 268 F. Supp. 2d 254, 260 (E.D.N.Y. 2003). Preliminary injunctions therefore have played, and likely will continue to play, a vital role in vindicating this fundamental right. Indeed, in many voting rights and election-related cases, the decision on a preliminary injunction often will *entirely* resolve a discrete controversy over a question at issue and the relief to which a party is entitled, such as whether a particular election will go forward, whether an election already held was legitimate, whether voters or classes of voters will be permitted to vote and have their votes counted fairly, and whether candidates or issues will be on a ballot for a particular election at all. For this reason, the rule proposed by Petitioners and the United States—that a preliminary injunction does not represent sufficient relief to justify prevailing party status—is simply incorrect as to these types of cases.

For instance, in *Brown v. Chote*, 411 U.S. 452 (1973), a unanimous Court upheld a preliminary injunction that required the State to allow an indigent candidate for the U.S. House of Representatives to put his name on the ballot without paying a filing fee. *Id.* at 455-57. The relief ordered by

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to gain access to the electoral system, *see e.g., Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004), as well as nonpartisan groups challenging laws that benefit political parties, *see, e.g., League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006).

the preliminary injunction completely resolved a discrete controversy—whether the candidate could be on the ballot. *See also Cripps v. Seneca County Bd. of Elections*, 629 F. Supp. 1335, 1344 (N.D. Ohio 1985) (granting preliminary injunction compelling certification of an independent candidate for inclusion on the general election ballot).

Similarly, courts have granted preliminary injunctions to ensure compliance with the Voting Rights Act, 42 U.S.C. §§ 1973, *et seq.*, and the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301 *et seq.*, to prevent hostile and unequal treatment of minority voters at the polling place or ensure that persons are not unlawfully prohibited from casting ballots. *See, e.g., Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004) (injunction enforcing HAVA requirement that voters be given provisional ballots); *United States v. Berks County*, 250 F. Supp. 2d 525, 526 (E.D. Pa. 2003) (injunction to prevent intimidation of Spanish-speaking voters by poll workers). Each of these preliminary injunctions governed the conduct of a specific upcoming election and resolved the controversy over how that election would go forward.

Preliminary injunctions have opened the polls in specific elections to the disabled pursuant to the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq. See, e.g., New York v. County of Del.*, 82 F. Supp. 2d 12, 19 (N.D.N.Y. 2000); *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 26 (N.D.N.Y. 2000). They have also guaranteed non-English speaking citizens their right to vote before specific elections. *See Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606, 611-12 (N.D. Ill. 1972) (granting preliminary injunction giving Spanish-speaking Puerto Rican U.S. citizens voting information and voting assistance in Spanish), *aff'd*, 490 F.2d 575, 580 (7th Cir. 1973); *see also Torres v. Sachs*, 381 F. Supp. 309, 313 (S.D.N.Y. 1974) (noting earlier preliminary injunction granting similar relief); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974) (noting temporary restraining order granting similar relief). And resi-

dents of federal lands have used preliminary injunctions to vindicate their right to vote in non-federal elections. *See Cornman v. Dawson*, 295 F. Supp. 654, 659-60 (D. Md. 1969) (noting earlier preliminary injunction granted to permit residents of federal lands within the state to be registered in the county voter registry).

Preliminary injunctions have permitted pretrial prisoners to vote by absentee ballot. *See Murphree v. Winter*, 589 F. Supp. 374, 380, 382 (S.D. Miss. 1984). They have prevented officials from barring homeless persons from registering to vote. *See Pitts v. Black*, No. 84-5270, 1984 U.S. DIST. LEXIS 23331 (S.D.N.Y. Sept. 25, 1984).

Preliminary injunctive relief has also enforced Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by preventing cities from unlawfully increasing the number of seats on a city council. *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981).

For the most part, these decisions have completely resolved a discrete controversy regarding how an election will go forward, and represented a "judicially sanctioned change in the legal relationship" between the citizen-plaintiffs and the government-defendants. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). The change in relationship is the direct result of a court order enforceable through the contempt power of a federal court and therefore bears a "judicial *imprimatur*." *Id.* at 605 (emphasis in original). Thus, the party obtaining such an injunction is a "prevailing party" entitled to fees.

Given the nature of elections themselves, with a set deadline, evolving facts, and an often-changing regulatory scheme, there is frequently no other way for a plaintiff challenging an electoral rule to obtain the relief sought—for instance, the opportunity to cast a meaningful vote in a particular election—than by way of preliminary injunctive relief. Indeed, and contrary to the theoretical musings of the United States in its amicus brief that plaintiffs "have substantial control over the timing of requests for preliminary relief" (Brief of United

States at 10), voting rights plaintiffs are often forced by the conduct of the relevant government officials to seek relief on an expedited basis on the eve of an election. They do not have "control over the timing of [such] requests" and would prefer not to have to resort to legal action in the first place.

An example of a case where plaintiffs did not have "substantial control over the timing of" the request for a preliminary injunction is *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). There, the Sixth Circuit addressed the reach of the then-newly effective Help America Vote Act in the context of an appeal from a preliminary injunction entered against the defendant, Ohio's Secretary of State. The defendant did not issue regulations and guidelines announcing how the State would comply with HAVA until September 16, 2004, just a month and a half before the November 2, 2004, presidential election. *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 979 (N.D. Ohio 2004), *aff'd in part and rev'd in part by* 387 F.3d 565. On September 27, 2004, plaintiffs filed a complaint and request for a preliminary injunction requiring the Secretary to revise the adopted regulations and guidelines in a manner consistent with HAVA. *Sandusky County*, 387 F.3d at 570. The district court granted a preliminary injunction on October 14, 2004, and defendant filed a notice of appeal to the Sixth Circuit the next day. *Id.* at 571. The Sixth Circuit then affirmed in part and reversed in part on October 26, 2004—a week prior to the election—holding in part that the state was required by HAVA to permit voters to cast provisional ballots and defendant was not permitted to allow poll workers to refuse provisional ballots based on their own on-the-spot determinations that a particular voter was not in the correct precinct or was otherwise ineligible to vote. *Id.* at 574-75.

The *Sandusky County* case is a recent example of how voting rights cases involving preliminary injunctions often proceed. Facts on the ground begin to develop at a rapid pace as an election becomes imminent. Local officials may issue

regulations and directions for how a particular election is to go forward just weeks before an election. Such circumstances, completely beyond the control of the average voter, may necessitate litigation by a candidate, a voter or a class of voters who would be disenfranchised or otherwise adversely affected by the officials' actions. All of this litigation, including possible proceedings in the Courts of Appeals and even before the Justices of this Court necessarily must be resolved by a date certain: the election. *See, e.g., Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 543 U.S. 1304 (Nov. 2, 2004) (Souter, Circuit Justice); *Spencer v. Pugh,* 543 U.S. 1301 (Nov. 2, 2004) (Stevens, Circuit Justice). Similarly, controversies concerning whether and how to count certain votes must be resolved before the date an election must be certified. *See, e.g., Bush v. Gore,* 531 U.S. 98, 110-111 (2000).

C. It Is Often Impossible or Impractical to Secure Final Relief on the Merits in Voting Rights Cases

A preliminary injunction is sometimes the only relief practical or even possible in voting rights cases. A particular issue may have relevance only for one election, so that the election itself moots the plaintiff's stake in a dispute. Even if the case is not technically moot, in the interest of preserving judicial resources—and indeed, those of the litigants on both sides of the dispute—it is not in the public interest to demand litigation to final judgment in every case.

In certain election cases where a preliminary injunction is obtained, it may not be possible for the plaintiffs to obtain a final "judgment on the merits" beyond the relief requested by preliminary injunction. Because each election is a singular event involving candidates, issues, and conditions that may never recur again, mootness is a very real possibility for any litigation around election season. A case becomes moot, of course, when the parties no longer "'have a personal stake in the outcome of the lawsuit.'" *Lewis v. Continental Bank*

Corp., 494 U.S. 472, 478 (1990) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In any constitutional challenge to state regulations or statutes, a case may become moot after a preliminary injunction through the voluntary conduct of state actors, who may alter or rescind laws such that "the allegedly wrongful behavior could not reasonably expected to recur." *Friends of the Earth, Inc., v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). This danger is especially acute with respect to the laws governing elections, which have been subject in recent years to frequently changing federal and state regulatory schemes; regulations or procedures put in place for one election season may not last past that election. The changes in regulations or procedures may result from decisions made prior to that election, new technological developments, newly elected officials, or from officials' rational responses to preliminary injunctions. Regardless of the reason, a plaintiff who achieves a preliminary injunction vindicating her voting rights in a particular election may not be able to obtain further judicial relief if her case is mooted by a change in the applicable rules or procedures governing subsequent elections.

In addition, the singularity of elections will often place particular litigants outside of the exception for disputes that are "capable of repetition, yet evading review." *Lewis*, 494 U.S. at 481. A particular candidate, ballot initiative sponsor, voter, or even class of voters, will often have no "'reasonable expectation that [they] would be subject to same action again.'" *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)); *see, e.g., Independence Party v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (where preliminary injunctive "relief granted in the district court . . . was limited in its applicability to" specific primary election which had passed, appeal from it was moot and no exceptions to mootness doctrine applied). A voter who complains of a registration application that government officials initially refused to process before an election, for instance, will likely be registered for subsequent

elections. A candidate who complains of a ballot qualification procedure may not have any intention of running for office again. Once their cases become moot, these plaintiffs who obtained preliminary injunctions would be unable to secure final judgment, and under the rule proposed by Petitioners and the United States, unable to receive attorneys' fees as a prevailing party—despite the fact that they secured all the relief they sought.

Furthermore, a rule precluding the award of fees in election-related cases would create "inefficiency because plaintiffs who have succeeded on the merits [of a preliminary injunction] would be encouraged to rush forward with potentially unnecessary litigation, solely to preserve their entitlement to fees." *Palmetto Props. v. County of DuPage*, 375 F.3d 542, 550 (7th Cir. 2004); *see also Lewis*, 494 U.S. at 480 (warning against unnecessary litigation solely to preserve eligibility for fee awards). Furthermore, given the uncertainty as to whether government officials will change their conduct in reaction to a court ruling on a preliminary injunction, these inefficiencies would be increased as plaintiffs would have incentives to take actions to assure that their claims remain litigable rather than resolve issues with the defendants in order to preserve their right to fees. Creating such an incentive to continue to litigate a case after plaintiffs have vindicated their rights would not further the purpose of the fee-shifting statutes, but rather are not meant to encourage litigation as such, but are meant to encourage the vindication of federal rights. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (a "judicial decree is not the end but the means" to "some action (or cessation of action) by the defendant that the judgment produces"). Encouraging litigants to continue litigating a case only to preserve an entitlement to attorneys' fees would also be inconsistent with this Court's assertion in *Buckhannon* that it has "avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (quoting *Tex.*

State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989)).

Similarly, the United States' repeated suggestion that attorneys' fees should not be available because "[p]arties that wish to convert a preliminary injunction into a full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2)" is unpersuasive. (Brief of United States at 7, 19, 20, 25.) The suggestion reflects a lack of familiarity with the real world of litigation in the district courts, where voting rights proceedings must be brought before busy district judges who are unlikely to be able to clear their congested calendars on short notice for "a full-blown merits" trial just because a particular plaintiff "wish[es]" it (and wishes it just to retain the right to attorneys' fees, no less). Under the time pressure in which preliminary injunctions arise in many types of cases, including in voting rights cases, it is often impossible to hold "a full-blown merits" trial, even if a judge's calendar were clear. In any event, a prudent district judge may reasonably find, under many circumstances, that the interests in issuing a prompt order outweigh the interest in holding a "full-blown merits" trial. *See, e.g., Berks County,* 250 F. Supp. 2d at 527 ("The Court held a hearing on March 13, 2003 and has expedited the issuance of this Memorandum and Order [on March 18, 2003] so as to give the parties as much time as possible to prepare for the May 20, 2003 primary election.").

D. Petitioners' and the United States' Proposed Rule Would Frustrate the Purpose of the Fee-Shifting Statutes in Voting Rights Cases and Is Contrary To Congressional Intent

Because cases arising in the election context are frequently resolved by preliminary injunction and are often impractical or impossible to litigate through to final judgment, the rule proposed by Petitioners and the United States would seriously jeopardize the availability of fees in voting rights

cases. This in turn would discourage their litigation, contrary to the intent of Congress in enacting fee-shifting statutes.

As explained above, preliminary injunctions play a crucial and sometimes decisive role in resolving controversies regarding the rights of citizens to vote in a free election. Thus, were the Court to strip litigants of the ability to obtain fees for vindicating the right to vote in hard-fought preliminary injunction proceedings, it would seriously threaten the ability of plaintiffs to recover fees in whole classes of voting rights litigation, where litigants succeed in protecting the right to vote in particular elections. Without the ability to recover fees for voting rights matters, public interest firms and pro bono attorneys would have to be even more selective than they already are in allocating their resources and deciding which cases to pursue. They would be less likely to pursue cases where the law is unclear, even if the public would benefit by a judicial ruling on the scope of a citizen's rights. The Court should not go down this path.

This Court last addressed the question of the proper construction of the term "prevailing party" in its decision in *Buckhannon*, 532 U.S. at 598. A preliminary injunction governing how an election will be conducted or determining whether citizens will be permitted to meaningfully cast a vote at all meets the terms of that decision. It is a "judicially sanctioned change in the legal relationship" of the citizen-plaintiffs and the government-defendants. *Id.* at 604. The change in relationship is the direct result of an injunction enforceable through the contempt power of a federal court and therefore bears a "judicial *imprimatur*." *Id.* (emphasis in original). Thus, the party obtaining such an injunction is a "prevailing party" entitled to fees.

Petitioners and the United States, however, ask the Court to depart from the statutory text and statements of legislative purpose and instead graft onto these touchstones of positive law a judicially created requirement of "final judgment on the merits." As to the language of the statute, this Court has clearly declared: "*Nothing* in the language of § 1988 condi-

tions the District Court's power to award fees on *full litigation of the issues . . .*" *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (emphases added) (upholding fees where plaintiffs settled and obtained a consent decree). Indeed, on this point, the Court in *Maher* was unanimous. *See id.* at 134 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (agreeing with conclusion that "the award of attorney's fees under § 1988 does not require an adjudication on the merits of the constitutional claims").

The United States argues that plaintiffs who have succeeded in securing preliminary injunctions but whose cases are subsequently rendered moot should not be entitled to their fees because a fee award would, purportedly, constitute a "preliminary injunction exception to *Buckhannon*'s rejection of the catalyst theory." (Brief of United States at 30, n.11.) This misreads *Buckhannon*. That *judicial* action may be characterized as a "catalyst" for a change in behavior by government officials does not mean that the award of fees for securing that judicial action is an endorsement of the specific "catalyst theory" discussed in *Buckhannon*, which rested on the *lack* of judicial action. *Buckhannon*, 532 U.S. at 605. The catalyst theory rejected in *Buckhannon* would have permitted the award of fees based on the voluntary change in behavior by government officials "where there is *no judicially sanctioned change* in the legal relationship of the parties." *Id.* (emphasis added). Indeed, a final judgment and permanent injunction compelling conduct by government officials will, quite literally, be a "catalyst" for the government officials to change their conduct in the sense that the change is required by court order. The award of fees in such cases where *judicial action* compels a change in conduct, however, cannot be characterized as an "exception to *Buckhannon*'s rejection of the catalyst theory."

In a situation where a party prevails on a preliminary injunction, and the government then changes its behavior in reaction to that judicial ruling, the change in behavior is not "voluntary" as understood by the "catalyst theory" set forth in

Buckhannon. Rather, such a change in conduct clearly has the "judicial *imprimatur*" missing from the rejected "catalyst theory." In such situations "[t]he relief . . . ultimately won," the preliminary injunction, "was specifically the relief . . . requested" notwithstanding the subsequent "voluntary" mooting of the case. *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999) (awarding attorneys' fees to prevailing plaintiffs after successful challenge by preliminary injunction to initiative governing campaign contributions, and rejecting argument that government's mooting of the case by repealing the initiative in response to preliminary injunction precluded the fee award). *See also Palmetto Props.*, 375 F.3d at 551 (where district court entered preliminary injunction enjoining enforcement of statute, and city then mooted case before final judgment in district court by repealing statute, parties are "prevailing parties" entitled to fees). To condition fees on "final judgment on the merits" would be unjust and contrary to Congress's intent.

As demonstrated above, preliminary injunctions play a vital role in ensuring that all citizens have the right to vote in a free, fair, and open election. For voting rights plaintiffs who face impending elections, certifications, or registrations, the preliminary injunction vindicating their rights is a clear legal victory: it provides the very enfranchisement of which they would otherwise have been deprived. *See Sandusky County Democratic Party v. Blackwell*, 191 Fed. Appx. 397, 399-401 (6th Cir. 2006) (affirming award of attorneys' fees to "prevailing parties" who obtained pre-election preliminary injunction).[4] The parties in such a proceeding have prevailed

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[4] While a stipulated permanent injunction was eventually entered in the *Sandusky County* case after the election, *see Sandusky County Democratic Party v. Blackwell*, No. 04-5782 (order granting permanent injunction) (Dec. 29, 2004), the rule proposed by Petitioners and the United States would create incentives for future defendants to refuse to enter into final settlement decrees in cases that are largely resolved by a preliminary in-

and have obtained all the relief that they want as to a particular election, which may be all they seek. Other plaintiffs may have received at least "some of the relief they sought" in the litigation in general. *Tex. State Teachers Ass'n*, 489 U.S. at 793 ("[Plaintiffs] prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus 'prevailing parties' within the meaning of § 1988."). But once an election transpires, that litigation may be impossible or impractical to follow through to final judgment, and to require that to happen before fees will be awarded would subvert Congress's intent. In addition to prevailing on the discrete controversy of how a particular election should proceed, the successful plaintiff in such cases has fulfilled the role of private attorney general and vindicated an important federal interest in ensuring that our elections are legitimate and viewed as such, and that the fundamental rights of citizens are protected.

This Court should affirm that plaintiffs prevailing on the difficult task of securing a preliminary injunction are indeed entitled to their attorneys' fees as "prevailing parties."

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junction, if the absence of a final judgment would defeat a subsequent motion for fees.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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